

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.

JUSTIN ANTHONY FISHER and JOSHUA  
RAY FISHER,  
  
Defendants.

Case No. 2:17-cr-00073-APG-GWF

**FINDINGS AND RECOMMENDATION**

**Re: Motion to Suppress  
Evidence (ECF No. 41)**

**ORDER**

**Re: Motion for Reconsideration  
(ECF No. 79)**

This matter is before the Court on Defendants' Motion to Suppress Evidence (ECF No. 41), filed on August 10, 2017, and the Government's Motion for Reconsideration of the Order Granting Evidentiary Hearing (ECF No. 79), filed on February 22, 2018.

Defendants' motion seeks to suppress evidence seized during the November 21, 2016 search of the residence at 10432 Burkehaven Avenue, Las Vegas, Nevada, on the grounds that the search warrant affidavit contained intentional or reckless misstatements or omissions of material fact. On November 15, 2017, the Court granted an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674 (1978). See *Order* (ECF No. 59). The hearing has been continued several times by stipulation of the parties. The evidentiary hearing was conducted on March 15, 2019. Expert witness Andrew Buel and Detective Scott Miller of the Las Vegas Metropolitan Police Department testified for the Government. Expert witness Adrian Leon Mare testified on behalf of the Defendants.

## BACKGROUND

### **1. Detective Miller's Search Warrant Affidavit:**

Detective Miller stated in the "Synopsis" section of his search warrant affidavit that Tumblr sent a report to the National Center for Missing and Exploited Children (NCMEC) on April 27, 2016 stating that a user identified as "mcw," with an IP address of 24.253.48.163 had "uploaded 8 child exploitation images on their *Tumblr* account." *Government's Hearing Exhibit No. 4*, at Bates No. 00107. Detective Miller determined that two of the images were child pornography. *Id.* In the "Probable Cause Offering" section of the affidavit, Detective Miller stated that Tumblr provided the following information to NCMEC regarding the user:

IP Address: 50.118.198.254 and 24.253.48.163  
 Date of Incident: April 19, 2016 at 14:14:00 UTC  
 Email Address: [mcwarson@gmail.com](mailto:mcwarson@gmail.com)  
 Screen/User Name: mcw  
 Profile URL <https://mcw/tumblr.com>.

*Id.* at Bates No. 00108.

The affidavit stated that an administrative subpoena was served on Cox Communications for subscriber information for IP address 24.253.48.163. Cox responded to the subpoena on June 14, 2016, reporting that the IP address resolved to Justin Fisher at 10432 Burkehaven Avenue, Las Vegas, Nevada. *Id.* at Bates Nos. 00108-109. A search warrant was served on Tumblr on July 1, 2016 "for all account information regarding Tumblr account [mcwarson@gmail.com](mailto:mcwarson@gmail.com), IP address 24.253.48.163, user name: mcw." On September 16, 2016, Tumblr responded to the search warrant "with numerous other images of child exploitation." *Id.* at Bates No. 00109. Detective Miller reviewed the images and determined that over 40 of them constituted child pornography. *Id.* A search warrant was also served on Google, Inc. for all account information for [mcwarson@gmail.com](mailto:mcwarson@gmail.com), but no return of further evidence of child exploitation was discovered. *Id.* Based on the foregoing information, a Clark County, Nevada Justice-of-the-Peace issued the search warrant for the premises at 10432 Burkehaven Avenue. The evidence found during the search of that residence led to the pending criminal charges against Defendants Justin Anthony Fisher and Joshua Ray Fisher.

1                   **2. Documents Relating to the Information in the Affidavit:**

2                   The April 27, 2016 CyberTipline Report that Tumblr sent to NCMEC identified the

3                   “User or Person Being Reported” as:

4                   Email Address:       mcwarson@gmail.com  
 5                   Screen/User Name: MCW  
 6                   Profile URL:       mcw.tumblr.com  
 7                   IP Address:       50.118.198.254 (Other).

8                   *Government’s Hearing Exhibit No. 2*, at Bates No. 00031.

9                   Under “Additional Information Submitted by Reporting ESP,” the CyberTipline Report  
 10                  stated:

11                  Please note: the IP provided in this report is the suspect’s last login IP.

12                  Suspect’s last logins:

13                  Mon, 18 Apr 2016 22:47:36 -0400 from 50.118.198.24 (CA-San Jose, US)  
 14                  Mon, 11 Apr 2016 22:05:09 -0400 from 24.253.48.163 (NV-Las Vegas, US)  
 15                  Tue, 05 Apr 2016 16:10:11 -0400 from 24.253.48.163 (NV-Las Vegas, US)  
 16                  Mon, 21 Mar 2016 20:06:42 -0400 from 24.253.48.163 (NV-Las Vegas, US)  
 17                  Wed, 16 Mar 2016 22:02:42 -0400 from 24.253.48.163 (NV-Las Vegas, US)

18                  Suspect’s associated blogs:

19                  fuckitthan - <http://fuckitthan.tumblr.com/> *Id.*

20                  A “Geo-Lookup” was automatically generated by the NCMEC system which found that  
 21                  IP address 50.118.198.24 resolved to San Francisco-Oakland-San Jose. It also contained a  
 22                  column heading “ISP/Org,” under which was stated: “EGIHosting/ Areti Internet.” *Id.* at Bates  
 23                  No. 1033. Under Section C, “Additional Information Provided by NCMEC,” the CyberTipline  
 24                  Report discussed IP address 24.253.48.163, which was related to an additional CyberTipline  
 25                  Report, Bates No. 10033465, and which was owned by Cox Communications in Las Vegas,  
 26                  Nevada. *Id.* at Bates Nos. 1034-1036.

27                  Based on the information pertaining to IP address 24.253.48.163, NCMEC determined  
 28                  that the information in CyberTipline #10001179 should be sent to “NV ICAC.” (Nevada Internet  
 Crimes Against Children Task Force). *Id.* at Bates No. 00036.

29                  The July 1, 2016 search warrant served on Tumblr required it to produce:

30                  All Tumblr account information for the following user on /or between the dates  
 31                  of April 19, 2016 through July 01, 2016:

1 IP Address: 50.118.198.254 and 24.253.48.163  
 2 Date of Incident: April 19, 2016 at 14:14:00 UTC  
 3 Email Address: mcwarson@gmail.com  
 4 Screen/User Name: mcw  
 5 Profile URL: <https://mcw.tumblr.com>

6 *Government's Hearing Exhibit 3*, at Bates No. 00066.

7 Tumblr responded to the search warrant by letter, with an attached Exhibit A, on  
 8 September 16, 2016. *Id.* at Bates Nos. 00074-76. The information provided by Tumblr in  
 9 Exhibit A was for the blog account—"http://mcw.tumblr.com/" which was created on January 1,  
 10 2016; email address—"mcwarson@gmail.com;" and a secondary blog account—  
 11 http://fuckitthan.tumblr.com/" which was created on March 29, 2016. *Id.* at Bates No. 00075.  
 12 Tumblr's response included a flash drive and a Login History for "http://mcw.tumblr.com/"  
 13 which included the notation: "\*Note: IP address corresponds to last actual login (exchange of  
 14 credentials) not last access." *Id.* at Bates No. 00075. The IP logins for "mcw.tumblr.com" were  
 15 listed as follows:

IP Address	Login Time
24.253.48.163	4/19/16 10:40
50.118.198.254	4/18/16 22:47
24.253.48.163	4/11/16 22:05
24.253.48.163	4/5/16 16:10
24.253.48.163	3/21/16 20:06
24.253.48.163	3/16/16 22:02
24.253.48.163	3/16/16 16:50
72.201.103.154	2/1/16 4:02
72.201.103.154	1/30/16 15:18
72.201.103.154	1/14/16 12:40
72.201.103.154	1/13/16 9:10
72.201.103.154	1/13/16 7:14
72.201.103.154	1/13/16 7:11
72.201.103.154	1/13/16 2:15
72.201.103.154	1/12/16 23:01
72.201.103.154	1/1/16 7:19

26 *Id.* at Bates No. 00076.

27 ...

28 ...

1                   **3. Order Granting Evidentiary Hearing:**

2                   In its order granting an evidentiary hearing, the Court found that the statement in the  
 3                   “Synopsis” section of the affidavit---that “*Tumblr* reported a user; ‘mcw’, screen/user name of  
 4                   mcw, and an IP address of 24.253.48.163 uploaded 8 child exploitation images on their *Tumblr*  
 5                   account”---was “clearly false” because the CyberTipline Report “did not state that the user  
 6                   uploaded the images to Tumblr from IP address 24.253.48.163.” The Court also found that such  
 7                   an inference could not be made from the CyberTipline Report. *Order* (ECF No. 59), at 8. The  
 8                   Court also found that the “Probable Cause Offering” in the affidavit was incomplete. While the  
 9                   affidavit correctly stated that the CyberTipline Report listed both IP addresses 50.118.198.254  
 10                  and 24.253.48.163, it failed to disclose that the last reported IP address login prior to the  
 11                  ‘incident’ was from IP address 50.118.198.254 on April 18, 2016. The Court stated that “[t]he  
 12                  omission of the dates when the logins from IP addresses 50.118.198.254 and 24.253.48.163  
 13                  occurred, combined with the misrepresentation in the Synopsis, reasonably could have led the  
 14                  justice-of-the-peace to believe that the [CyberTipline] report stated that the upload of child  
 15                  pornography images on April 19, 2016 was made from a computer using IP address  
 16                  24.253.48.163.” *Id.* at 9.<sup>1</sup>

17                   **4. Testimony of Government Expert Witness Andrew Buel:**

18                  The Government’s expert witness, Andrew Buel, has been employed by the FBI for  
 19                  approximately 8 years. The parties stipulated that he is an expert in computer forensics and  
 20                  networking, including Virtual Private Networks (VPNs). Mr. Buel testified that parties using a  
 21                  VPN network communicate with each other through a “tunnel”<sup>2</sup> and the communication is  
 22                  encrypted. A person using a VPN to communicate on the internet can obscure his or her true IP  
 23                  address and identity because the communication appears to originate from the VPN’s IP address,  
 24                  rather than the user’s actual IP address. Mr. Buel testified that is it easy for a person trained in

25 \_\_\_\_\_  
 26 <sup>1</sup> The words “false” and “misrepresentation” used in Order (ECF No. 59) did not mean that the Court had  
 27 determined that Detective Miller made intentional or reckless misstatements or omissions of fact. Such a  
 28 determination can only be made following an evidentiary hearing, and the Court’s consideration of the  
 affiant’s explanations, and other circumstances relevant to state of mind.

<sup>2</sup> Mr. Buel’s testimony was unclear as to the word used.

1 computer forensics or networking to recognize an actual residential IP address and a VPN IP  
2 address. Mr. Buel testified that VPN providers do not identify or are unable to identify the IP  
3 addresses that communicated through the VPN at any particular time. The VPN providers do not  
4 collect such IP address login information or are unable to identify a particular IP address because  
5 multiple IP addresses connect to the VPN at the same time.

6 Mr. Buel testified that in looking at the information provided in the CyberTipline Report,  
7 he would have immediately recognized IP address 50.118.198.254 as a VPN or a Virtual Private  
8 Server (VPS) IP address. He was not able to determine from the CyberTipline Report which  
9 listed IP address uploaded the child pornography images to the Tumblr account.<sup>3</sup>

##### 10 **5. Detective Miller's Hearing Testimony:**

11 Detective Miller testified that upon joining the Internet Crimes Against Children Task  
12 Force in December 2015, he received training in how to read a CyberTipline report. Since that  
13 time, he has reviewed over one hundred CyberTipline reports. Detective Miller's understanding  
14 of a VPN is that someone in the "public domain" can connect to a VPN which masks the actual  
15 Internet Protocol (IP) address of the person communicating through the VPN. He stated that a  
16 lot of private companies use VPNs so that their employees can communicate securely. Detective  
17 Miller testified that investigations of electronic communications made through a VPN may lead  
18 to the identification of the company or computer server providing the Virtual Private Network,  
19 but it will not result in investigators being able to identify the IP address that communicated  
20 through the VPN.

21 Detective Miller testified that the information in the CyberTipline Report under "User or  
22 Person Being Reported" listed IP address "50.118.198.254 (Other)," *Government Hearing*  
23 *Exhibit 2*, at Bates No. 00031, indicated to him that there was more than one IP address involved  
24 in the report. Under the next section of the report, "Additional Information Submitted by the  
25 Reporting ESP," the suspect's last logins were listed. This showed that the most recent login  
26

---

27 <sup>3</sup> Defendants' expert witness, Mr. Mare, did not provide any pertinent testimony to the determination of  
28 the motion to suppress. Therefore, his testimony is not summarized in these Findings and  
Recommendation.

1 was from IP Address 50.118.198.254 (CA-San Jose, US) on Monday April 18, 2016. The  
2 preceding four logins were from IP address 24.253.48.163 (NV-Las Vegas, US). *See Id.* at  
3 Bates No. 00031. Detective Miller testified that this portion of the report raised “red flags” that  
4 “something isn’t right with that IP address [50.118.198.254].” He explained that NCMEC  
5 attempts to determine the jurisdiction in which the transmission of child pornography occurred  
6 so that the information can be sent to the law enforcement agency in that jurisdiction. NCMEC  
7 somehow determined that Las Vegas, Nevada was the appropriate jurisdiction to send the report.

8 Detective Miller believed that information under “Section B: Automated Information  
9 Added by NCMEC System,” *Government Hearing Exhibit 2*, at Bates No. 00033, regarding IP  
10 Address 50.118.198.254, was referenced because it was the last listed login on Tumblr from the  
11 suspect account. The reference to “EGIHosting/ Areti Internet” under the heading “ISP/Org,”  
12 indicated that IP Address 50.118.198.254 must be a VPN. Detective Miller performed some  
13 additional research and determined that IP Address 50.118.198.254 was, in fact, a VPN.

14 “Section C: Additional Information Provided by NCMEC” of the CyberTipline Report  
15 stated that there was an associated CyberTipline Report No. 10033465. *Id.* at Bates No. 00034.  
16 This associated report concerned IP address 24.253.48.163. The associated report was generated  
17 on May 26, 2016, a month after the parent CyberTipline Report No. 10001179. At the end of  
18 Section C, CyberTipline Report No. 10001179 stated: “Based on IP address 24.253.48.163, I  
19 will place this report on the VPN for the NV ICAC.” *Id.* at Bates No. 00036. Detective Miller  
20 testified that this statement indicated that based on IP address 24.253.48.163, NCMEC  
21 determined that the CyberTipline Report should be forwarded to the Nevada task force for  
22 further investigation.

23 Detective Miller testified that he applied for the subject search warrant after he received  
24 the returns on the search warrants served on Tumblr and Google, and the response to the  
25 administrative subpoena sent to Cox Communications for IP address 24.253.48.163. The search  
26 warrant sent to Tumblr requested all account information for the user “mcw” from April 19,  
27 2016 through July 1, 2016 and listed both IP addresses 50.118.198.254 and 24.253.48.163. *See*  
28 *Government Hearing Exhibit 3*, at Bates No. 00059. Detective Miller did not expect to “get

1 anything back” on IP address 50.118.198.254 since it was a VPN and was “all encrypted.” The  
2 flash drive received from Tumblr contained 40 images of child exploitation, i.e. child  
3 pornography. Detective Miller believed that all of the images in the flash drive were uploaded  
4 from IP address 24.253.48.163.

5 Detective Miller testified that he stated in the Synopsis of his affidavit that the user of IP  
6 address of 24.253.48.163 had uploaded the 8 child exploitation images on their *Tumblr* account  
7 because the other listed IP address, 50.118.198.254, was a VPN that “didn’t come back to  
8 anything” and was, in his opinion, irrelevant. The other information in the CyberTipline Report  
9 and in Tumblr’s response to the search warrant pointed to IP address 24.253.48.163 as the  
10 address from which the child pornography was uploaded to Tumblr. Under cross-examination,  
11 Detective Miller stated that the search warrant to Tumblr only requested Tumblr account  
12 information for the user, mcw, from April 19, 2016 through July 1, 2016 for IP addresses  
13 50.118.198.254 and 24.253.48.163. Because IP address 50.118.198.254 was an encrypted VPN,  
14 he believed the images produced by Tumblr in the flash drive were uploaded from IP address  
15 24.253.48.163.

16 Detective Miller testified that the information regarding the associated CyberTipline  
17 Report, No. 10033465, also pointed to IP address 24.253.48.163 as the source of the uploaded  
18 child pornography. The login information in Tumblr’s response to the search warrant,  
19 *Government Hearing Exhibit 3*, at Bates No. 00076, was significant to him because the last login  
20 listed on April 19, 2016 was IP address 24.253.48.163. Defendant’s counsel pointed out that  
21 Tumblr’s response to the search warrant also listed a third IP address, 72.301.103.154, which  
22 logged into Tumblr on January 1, 2016, January 12, 2016, January 13, 2016 (three times),  
23 January 14, 2016, January 30, 2016, and February 1, 2016. These logins were not identified in  
24 Detective Miller’s affidavit.

### 25 **DISCUSSION**

26 The Fourth Amendment to the United States Constitution states that “no Warrants shall  
27 issue, but upon probable cause, supported by Oath or affirmation and particularly describing the  
28 place to be searched, and the persons or things to be seized.” A judicial officer may authorize



1 the search of a location only if the affidavit establishes probable cause to believe that evidence of  
2 a crime will be found there. *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006).

3 “[P]robable cause means a fair probability that contraband or evidence is located in a particular  
4 place. Whether there is a fair probability depends upon the totality of the circumstances,  
5 including reasonable inferences, and is a common sense, practical question. Neither certainty or  
6 a preponderance of the evidence is required.” *United States v. Kleinman*, 880 F.3d 1020, 1036  
7 (9th Cir. 2018) (quoting *United States v. Kelley*, 482 F.3d 1047, 1050 (9th Cir. 2007)). The  
8 issuing judge need not determine “that the evidence is more likely than not to be found where the  
9 search takes place. He or she need only conclude that it would be reasonable to seek evidence in  
10 the place indicated in the affidavit.” *United States v. Ruiz*, 758 F.3d 1144, 1148 (9th Cir. 2014)  
11 (citing *United States v. Ocampo*, 937 F.2d 485, 490 (9th Cir. 1991)).

12 A search warrant is not valid if the affidavit on which it is based fails to provide a  
13 substantial factual basis on which to conclude that probable cause exists. “Conclusions of the  
14 affiant unsupported by underlying facts cannot be used to establish probable cause.” *United*  
15 *States v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013) (citing *United States v. Cervantes*,  
16 703 F.2d 1135, 1139-40 (9th Cir. 2012)). The affidavit “must recite underlying facts so that the  
17 issuing judge can draw his or her own reasonable inferences and conclusions; it is these facts that  
18 form the central basis of the probable cause determination.” *Id.* (citing *United States v.*  
19 *Ventresca*, 380 U.S. 102, 108-09, 85 S.Ct. 741 (1965); *Giordenello v. United States*, 357 U.S.  
20 480, 486, 78 S.Ct. 741 (1958)). The applicant for a search warrant must therefore take care to  
21 present all relevant and material facts for the issuing judge’s consideration. “[B]y reporting less  
22 than the total story, an affiant can manipulate the inferences a magistrate will draw,’ and that  
23 ‘[t]o allow a magistrate to be misled in such a manner could denude the probable cause  
24 requirement of all real meaning.” *United States v. Ruiz*, 758 F.3d at 1148 (quoting *United States*  
25 *v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985), *amended by* 769 F.2d 1410 (9th Cir. 1985)).

26 In *Franks v. Delaware*, 438 U.S. 154, 156, 98 S.Ct. 2674, 2676 (1978), the Supreme  
27 Court stated that  
28

1 where the defendant makes a substantial preliminary showing that a false  
2 statement knowingly and intentionally, or with reckless disregard for the truth,  
3 was included by the affiant in the warrant affidavit, and if the allegedly false  
4 statement is necessary to a finding of probable cause, the Fourth Amendment  
5 requires that a hearing be held at the defendant's request. In the event that at  
6 that hearing the allegation of perjury or reckless disregard is established by the  
7 defendant by a preponderance of the evidence, and, with the affidavit's false  
8 material set to one side, the affidavit's remaining content is insufficient to  
9 establish probable cause, the search warrant must be voided and the fruits of  
10 the search excluded to the same extent as if probable cause was lacking on the  
11 face of the affidavit.

12 Allegations of negligence or innocent mistake by the affiant are not sufficient to trigger  
13 an evidentiary hearing. *Id.*, 438 U.S. at 171, 98 S.Ct. at 2684.

14 In *United States v. Stanert*, 762 F.2d at 780-81, the Ninth Circuit held that the Fourth  
15 Amendment also "mandates that a defendant be permitted to challenge a warrant affidavit valid  
16 on its face which contains deliberate or reckless omissions of fact that tend to mislead." Clear  
17 proof of deliberate or reckless omission is not required to obtain an evidentiary hearing. "[A]ll  
18 that is required is that the defendant make a substantial showing that the affiant intentionally or  
19 recklessly omitted facts required to prevent technically true statements in the affidavit from  
20 being misleading." *Id.* at 781. A defendant challenging an affidavit on the basis of deliberate or  
21 reckless omissions "must also show that the affidavit purged of those falsities and supplemented  
22 by the omissions would not be sufficient to support a finding of probable cause." *Id.* at 782. *See*  
23 *also United States v. Jawara*, 474 F.3d 565, 582 (9th Cir. 2007); *United States v. Perkins*, 850  
24 F.3d 1109, 1116 (9th Cir. 2017); and *United States v. Kleinman*, 880 F.3d at 1038.

25 Detective Miller stated in his Synopsis that Tumblr reported to NCMEC that a user with  
26 IP address of 24.253.48.163 uploaded 8 child exploitation images on their *Tumblr* account. This  
27 statement was untrue and misleading in that it conveyed that Tumblr had affirmatively made  
28 such statement to NCMEC. It had not. The statement was actually Detective Miller's  
conclusion based on his analysis of the CyberTipline Report and the information that Tumblr  
provided in response to the search warrant. Detective Miller's statement would not have been  
problematical if he had clearly identified it as his opinion or conclusion, and had included in the  
affidavit all of the relevant facts that the issuing judge would need to independently determine

1 whether there was probable cause to believe that images of child pornography had been uploaded  
2 from IP address 24.253.48.163.

3 The affidavit did not explain that someone using IP address 50.118.198.254 logged into  
4 the Tumblr account on April 18, 2016. In fact, the affidavit made only one reference to IP  
5 address 50.118.198.254, *Government Hearing Exhibit 4*, at Bates No. 00108, and contained no  
6 discussion of that IP address or the basis for Detective Miller's alleged belief that it was  
7 irrelevant. The affidavit also did not include the four prior login dates on April 11, April 5,  
8 March 21, and March 16, 2016 from IP Address 24.253.48.163. It also did not include the  
9 information in Tumblr's response to the search warrant that someone using IP Address  
10 24.253.48.163 logged into the Tumblr account on April 19, 2016 at 10:40, which occurred only a  
11 few hours before the "Incident Time" of 14:14:00 UTC reported in the CyberTipline Report.  
12 The affidavit also omitted the information that a person or persons using IP address  
13 72.201.103.154 logged into the Tumblr account eight times in January 2016, and one time on  
14 February 1, 2016.

15 There is no disagreement that the IP address login times indicate only when someone  
16 logged into the Tumblr account from a particular IP Address. They do not establish when or if a  
17 user actually uploaded images to the Tumblr account. Detective Miller testified that he believes  
18 the images in the flash drive provided by Tumblr were uploaded from IP Address 24.253.48.163.  
19 He based this on the fact that the search warrant requested all Tumblr account information for the  
20 user, "mcw," IP addresses 50.118.198.254 and 24.253.48.163 during the period from April 19,  
21 2016 through July 1, 2016. He appeared to believe that the images could not have been uploaded  
22 from IP addresses 50.118.198.254 because it was an "encrypted" VPN. The fact that the VPN is  
23 "encrypted," however, does not mean that a person logging into the Tumblr account through that  
24 VPN IP address could not upload the child pornography images to the Tumblr account. A  
25 person engaging in the illegal transmission of child pornography might well choose to do so  
26 through a VPN IP address in order to conceal his or her actual IP address and identity. No  
27 evidence was presented at the hearing that information had been uploaded to the Tumblr account  
28 that could not be "opened" because it was encrypted.

1 If Detective Miller had included all of the relevant and material information in his  
2 affidavit for the search warrant, it would have including the following:

3 1. On or about April 19, 2016 Tumblr discovered a suspected uploading of eight images  
4 of child exploitation or child pornography to account mcw.tumblr.com which it reported to the  
5 National Center for Missing and Exploited Children (NCMEC) on April 27, 2016. Detective  
6 Miller reviewed the eight images and determined that two of them constituted child pornography.

7 2. The Tumblr CyberTipline Report listed the following IP address logins to the Tumblr  
8 account:

9  
10 Mon, 18 Apr 2016 22:47:36 -0400 from 50.118.198.24 (CA-San Jose, US)  
11 Mon, 11 Apr 2016 22:05:09 -0400 from 24.253.48.163 (NV-Las Vegas, US)  
12 Tue, 05 Apr 2016 16:10:11 -0400 from 24.253.48.163 (NV-Las Vegas, US)  
13 Mon, 21 Mar 2016 20:06:42 -0400 from 24.253.48.163 (NV-Las Vegas, US)  
14 Wed, 16 Mar 2016 22:02:42 -0400 from 24.253.48.163 (NV-Las Vegas, US)

15 3. Tumblr subsequently provided information in response to a search warrant for all  
16 account information for the user, "mcw," IP Addresses 50.118.198.254 and 24.253.48.163, from  
17 April 19, 2016 through July 1, 2016. The flash drive produced by Tumblr contained numerous  
18 images of sexual content, over forty of which Detective Miller determined to be images or videos  
19 of child pornography, and seven of which were described in the search warrant affidavit.

20 4. The IP address logins provided by Tumblr in response to the search warrant were as  
21 follows:

IP Address	Login Time
24.253.48.163	4/19/16 10:40
50.118.198.254	4/18/16 22:47
24.253.48.163	4/11/16 22:05
24.253.48.163	4/5/16 16:10
24.253.48.163	3/21/16 20:06
24.253.48.163	3/16/16 22:02
24.253.48.163	3/16/16 16:50
72.201.103.154	2/1/16 4:02
72.201.103.154	1/30/16 15:18
72.201.103.154	1/14/16 12:40
72.201.103.154	1/13/16 9:10
72.201.103.154	1/13/16 7:14
72.201.103.154	1/13/16 7:11

1           72.201.103.154      1/13/16 2:15  
2           72.201.103.154      1/12/16 23:01  
3           72.201.103.154      1/1/16 7:19

4           5. IP address 50.118.198.254 was determined to be the IP address for a Virtual Private  
5 Network (VPN), making it unlikely that the law enforcement could identify the IP address that  
6 actually logged into the account on April 18, 2016.

7           6. The owner of IP address 24.253.48.163, Cox Communications, provided information  
8 in response to a subpoena that the subscriber was Joshua Fisher at 10432 Burkehaven Avenue,  
9 Las Vegas, Nevada.

10           If these facts had been included in the search warrant affidavit, there would still have  
11 been probable cause to believe that the child pornography images were uploaded to Tumblr from  
12 IP address 24.253.48.163, most likely on April 19, 2016 in close proximity to when Tumblr  
13 discovered the uploading of suspect images. This, in turn, would have provided probable cause  
14 to issue a warrant to search the residence of the IP address subscriber, Joshua Fisher, at 10432  
15 Burkehaven Avenue, Las Vegas, Nevada. The affidavit provided information regarding the  
16 behavioral characteristics of persons who engage in the possession and distribution of child  
17 pornography which provided reason to believe that child pornography would be found on  
18 electronic devices located at that residence. *See Government Hearing Exhibit 4*, at Bates Nos.  
19 00111-13.

20           The foregoing does not rule out that there was also probable cause to believe that the  
21 child pornography images had been uploaded to the Tumblr account on or about April 18-19,  
22 2016 by a person using the VPN IP address 50.118.198.254. Probable cause is not necessarily an  
23 “either or” proposition. Under the totality of the circumstances, there was a fair probability that  
24 the images of child pornography were uploaded to the Tumblr account on April 19, 2016 from IP  
25 address IP address 24.253.48.163. There was also a fair probability, but perhaps to a lesser  
26 extent, that the images had been uploaded by a person who logged into the account through VPN  
27 IP address 50.118.198.254. It is less likely that the child pornography was uploaded to the  
28 Tumblr account in January or February 1, 2016 from IP address 72.201.103.154, given that  
Tumblr did not identify the suspicious uploading until April 19, 2016, and there had been six

1 intervening logins from IP address 24.253.48.163 and one from IP address 50.118.198.254 after  
2 the last login from IP address 72.201.103.154.

3 Because there would still have been probable cause for the issuance of the search warrant  
4 if the misleading statement in the affidavit had been corrected and all relevant information had  
5 been included, the Court is not required to determine whether Detective Miller's misstatement  
6 and omissions were intentional or reckless. Nevertheless, it does not appear that Detective  
7 Miller intentionally misled the issuing judge. He erred in presenting his opinion that the images  
8 were uploaded from IP address 24.253.48.163 as a statement of undisputed fact, and by not  
9 providing all of the information necessary to make an independent determination of probable  
10 cause. Detective Miller appeared to be generally credible as a witness. Perhaps more telling, he  
11 had no reason to intentionally mislead the issuing judge because a factually accurate and  
12 complete affidavit would have provided probable cause for the issuance of the warrant. The  
13 issue of recklessness is a closer call. Detective Miller is an experienced detective and should  
14 know the importance of providing full and accurate factual information in an affidavit, rather  
15 than conclusions in the guise of facts. Accordingly,

16 **RECOMMENDATION**

17 **IT IS HEREBY RECOMMENDED** that Defendants' Motion to Suppress Evidence  
18 (ECF No. 41) be **denied**.

19 **ORDER**

20 **IT IS HEREBY ORDERED** that the Motion for Reconsideration of the Order Granting  
21 Evidentiary Hearing (ECF No. 79) is **denied**.

22 DATED this 28th day of March, 2019.

23 

24 **GEORGE FOLEY, JR.**  
25 **UNITED STATES MAGISTRATE JUDGE**